Supreme Court, U. S.
FILED
MAY 30 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1708

HENRY T. BULLINGTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
QUESTION PRESENTED 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
ARGUMENT 6
CONCLUSION 12
CERTIFICATE OF SERVICE 13
APPENDIX A A1
APPENDIX B A2

Citations

CASES

United States v. *Ailstock*, 546 F.2d 1285 (6th Cir. 1977) 9
United States v. *Beechum*, 555 F.2d 487 (5th Cir. 1977) 9
United States v. *Cook*, 557 F.2d 1149 (5th Cir. 1977) 7
United States v. *Czarnecki*, 552 F.2d 698 (6th Cir. 1977) 9
United States v. *Dudek*, 560 F.2d 1288 (6th Cir. 1977) 9
Hearst v. *United States*, 563 F.2d 1331 (9th Cir. 1977) 7
United States v. *Herzberg*, 558 F.2d 1219, 1224 (5th Cir. 1977) 9
United States v. *Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976) 7, 9
United States v. *Machen*, 430 F.2d 523, 526 (7th Cir. 1970) 9
Manning v. *Rose*, 507 F.2d 889 (6th Cir. 1974) 9

United States v. *McFadyen-Snider*, 552 F.2d 1178 (6th Cir. 1977) 9
Michelson v. *United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L.ed. 168 (1948) 6
United States v. *Oliver*, 525 F.2d 731, 739-740 (8th Cir. 1975) 9
United States v. *Peskin*, 527 F.2d 71, 84 (7th Cir. 1975) 7
United States v. *Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975) 6
United States v. *San Martin*, 505 F.2d 918, 921-922 (5th Cir. 1974) 9
United States v. *Wiley*, 534 F.2d 659 (6th Cir. 1976) 8

OTHER

Dolan, 49 So. Cal. L. Rev. 220 (1976) 9
FRE 403 .....2, 6, 7, 10
FRE 404(b) 2, 6, 7, 9, 10

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Henry T. Bullington petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals (App. A, *infra*, p. A1), is not yet reported. The opinion of the District Court (App. B, *infra*, p. A2) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, p. A1) was entered on May 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in ruling that the introduction of evidence of defendant's criminal conduct which occurred subsequent to the act charged was admissible as part of the government's case in rebuttal, and whether failure of the trial judge to grant defendant's motion for a mistrial based on the introduction of this evidence was an abuse of discretion.

STATUTES INVOLVED

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, FRE

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), FRE

STATEMENT OF THE CASE

During the Christmas season of 1975, while Henry Bullington and his family were visiting the Leesburg, Florida, home of a long-time friend, S. E. Montgomery, another visitor came to call. His name was Bobby Caruthers and was also a friend of Montgomery. Henry Bullington had met Caruthers when previously in the company of Montgomery. Their acquaintanceship was renewed and the conversation turned to a gray Lincoln Continental which Caruthers was driving. Apparently Mrs. Bullington was intrigued by this car. Caruthers suggested that the Lincoln was for sale and attempted to persuade Bullington to buy the car. Bullington was not interested in the car, but Caruthers was persistent. Finally, Montgomery took Bullington aside and told him that he, Montgomery, would like to buy the Lincoln, but that he needed Bullington to appear to be the purchaser. It seemed that Caruthers owed Montgomery some money which Montgomery had doubts about collecting. If Bullington would "buy" the car from Caruthers, Montgomery promised to cover his check and pick the car up at Bullington's home in Cookeville, Tennessee. Montgomery had family and regular business in the Cookeville area and needed the car for his personal use.

Based on Montgomery's request, Bullington instructed his wife to write a $4,000.00 check postdated some 30 days as a down payment for the Lincoln. Caruthers was to hold the check until he procured the title and send the check through Bullington's bank with the title attached. In the meantime, Montgomery was to claim his car from Bullington and cover the $4,000.00 check with Caruthers being none the wiser.

A few days later Bullington, his wife and two children drove back to Cookeville in the Lincoln and another car

which had been purchased from Montgomery for a business associate of Bullington's.[1]

Upon their return to Cookeville, Mrs. Bullington became concerned that Caruthers might attempt to negotiate the check without delivering the title. She called the bank for advice and upon that advice issued a stop payment order on the check. Caruthers did in fact attempt to negotiate the check and payment was refused. The title was never delivered and Montgomery ultimately made the check good. Montgomery did take possession of the Lincoln as originally planned during the third week of January, 1976, and kept it until March. During the last part of March, 1976, Montgomery asked Bullington to drive it back to Cookeville where he would pick it up later. This Bullington did, but the FBI picked it up almost immediately upon his return.

Bullington denied any knowledge of the stolen nature of the Lincoln or any attempt to conceal it with knowledge that it was stolen.

Caruthers testified that Bullington and Montgomery both knew that he had just received the car from the thief and that there was never any discussion about delivery of a title. He offered no explanation for the postdated check.

Montgomery was not called as a witness, but was declared unavailable to either side as he indicated his intention to exercise his Fifth Amendment rights and to refuse to answer any questions relating to the transactions in question.

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1. Only the Lincoln was stolen.

Caruthers was recalled by the government as a rebuttal witness and was asked to recount a conversation with Bullington that allegedly occurred late in January:

"BY MR. FARMER:

Q. Mr. Caruthers, I will ask you if you recall the date that you were arrested in Florida in connection with these car charges?

A. It was either on the night of January the 26th or the 27th. It was—I was arrested about, I guess, nine or ten o'clock at night or between eight and ten, but they didn't fill the papers out until I guess three or four o'clock the next morning, so I didn't know exactly what the date would have been, but it would have been the 26th or 27th.

Q. Do you know where Henry Bullington was then?

A. Yes.

Q. Where was he?

A. At the Holiday Inn in Wildwood, Florida.

Q. And why was he there?

A. To receive some stolen pickup trucks that I had arranged for him.

Q. All right, sir.

BY MR. SCHWARTZ: I don't know what he said, but I object if he said what I think he said.

BY THE COURT: Let the jury step out."

The presentation of this rebuttal evidence by the government prompted a motion for a mistrial. The trial court overruled the motion and admitted the evidence. This action by the trial court frames the issue raised by this petition.

ARGUMENT

The proper interpretation of the interplay between Rules 403 and 404(b) of the Federal Rules of Evidence[2] has not been addressed by this Court. Furthermore, there are some apparent conflicts among the circuits as to the proper standards for determining admissibility.

The adoption of Rules 403 and 404(b) of the Federal Rules of Evidence did not amount to a significant departure from recognized standards of admissibility of evidence pertaining to "other crimes". While it has long been well-established that evidence of other crimes (generally limited to evidence of "prior" crimes) may not be used to prove the predisposition or propensity of one charged with a crime to commit such a crime, this evidence may be admissible for more limited purposes. The demonstration of motive, design, lack of mistake or intent have long been recognized exceptions to the general rule of exclusion. As Wigmore pointed out, this evidence is not generally admissible "not because it has no appreciable value but because it has too much." 1 J. Wigmore, Evidence 194 (3rd ed. 1940), quoted in *United States* v. *Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975). This Court clearly echoed the same concern in *Michelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L.ed. 168 (1948).

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2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 403 FRE.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 404(b) FRE.

Therefore, it can be said that Rule 404 establishes rules of relevancy by delineating the exceptions carved out by case law, while Rule 403 requires exclusion where probative value is substantially outweighed by the danger of unfair prejudice. It is the petitioner's contention that it is the danger of unfair prejudice that requires exclusion; and further that there can be no question that this danger of prejudice, not to mention actual prejudice, occurred in this case.

To achieve the proper harmony between Rules 403 and 404(b), petitioner contends that the Court must consider at least three factors: (1) are subsequent acts subjected to a more stringent test of admissibility than are prior acts, (2) was the admitted evidence necessary to an appropriate presentation of the issues involved, and (3) what is the proper standard that should be applied to "other crimes, wrongs or acts" to render them admissible.

Subsequent Acts

The court admitted the subsequent conversation between Caruthers and Bullington as evidence of Bullington's state of mind at a period some three weeks prior when he took possession of the stolen automobile. That is to say, that the trial court determined that the subsequent conversations were relevant to petitioner's motive. While there may be some situations where Rule 404(b) should be extended to include evidence of acts subsequent to those charged in the indictment,[3] it is petitioner's conten-

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3. *United States* v. *Peskin*, 527 F.2d 71, 84 (7th Cir. 1975); *United States* v. *Cook*, 557 F.2d 1149, 1152-1153 (5th Cir. 1977); *United States* v. *Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976); *Hearst* v. *United States*, 563 F.2d 1331 (9th Cir. 1977), cert. denied ..... U.S. .....

tion that such evidence should be admitted only where there are compelling circumstances.

In this case, the evidence of Bullington's state of mind three or four weeks after the transportation of the stolen automobile was not shown to have any relevancy to the issues joined in count one of the indictment. While it may be successfully argued that a prior act of misconduct is relevant to future acts, the converse is not necessarily the case. The determination of relevancy in this case is simply not supported by logic, and absent some compelling reason the evidence should not have been admitted.

Necessity of the Evidence

Before potentially prejudicial evidence should be admitted into evidence, it has been repeatedly held that its introduction should be necessary. That is, the proffered evidence should be of the type that cannot be supplied by other evidence. This standard becomes of paramount importance where the evidence is offered by a key government witness whose credibility is a crucial issue in the determination of the guilt or innocence of the accused. As was pointed out in *United States* v. *Wiley*, 534 F.2d 659 (6th Cir. 1976), where the government's case rested almost entirely upon the testimony of one Dean, it was improper to allow Dean to testify that Wiley had been involved in other criminal activity. Here the government's entire case as to the intent or motive of Bullington depended upon the testimony of Caruthers, an admitted fence. The sensitivity of this situation was enhanced by the unavailability of Montgomery who was a material witness to and participant in the negotiations and conversations between Caruthers and Bullington. The record further demonstrates that Caruthers was seeking favors from the government for his testimony and was anxious to volunteer

any and all testimony that was damaging to Bullington. Given his direct testimony concerning Bullington's knowledge of the stolen nature of the Lincoln and given the obvious danger of prejudice that the admission of the subsequent evidence carried, his rebuttal testimony was simply not necessary nor was it worth the attendant risk.[4]

Petitioner contends that the approach adopted by the Fifth Circuit is the best reasoned and should be adopted.

The Proper Standard

Rule 404(b) provides that evidence of "other crimes, wrongs or acts" may be admissible under certain circumstances. It is the petitioner's contention that the existence of the other act should be shown by clear and convincing evidence. This is the standard adopted by the Fifth and Eighth Circuits.[5] The opinions of the Sixth Circuit have not announced the appropriate standard to be applied, but have left the matter to the discretion of the trial judge with nonspecific guidelines.[6]

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4. See *Dolan*, 49 So. Cal. L. Rev. 220 (1976). Where the author demonstrates a preference for exclusion of potentially prejudicial evidence where other clearly admissible evidence is available. This approach has been adopted by the Fifth Circuit which has set "high barriers to weed out marginally probative evidence." One of the "high barriers" is "a substantial need for the probative value of the evidence provided for by the prior offenses." *United States* v. *Herzberg*, 558 F.2d 1219, 1224 (5th Cir. 1977) citing *United States* v. *San Martin*, 505 F.2d 918, 921-922 (5th Cir. 1974); *Cf. United States* v. *Beechum*, 555 F.2d 487, 495-509 (5th Cir. 1977).

5. *United States* v. *Oliver*, 525 F.2d 731, 739-740 (8th Cir. 1975); *United States* v. *Herzberg*, 558 F.2d 1219, 1224 (5th Cir. 1977); *Cf. Manning* v. *Rose*, 507 F.2d 889, 892, fn. 5 (6th Cir. 1974); *United States* v. *Machen*, 430 F.2d 523, 526 (7th Cir. 1970).

6. *United States* v. *Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976); *United States* v. *Ailstock*, 546 F.2d 1285, 1289 (6th Cir. 1977); *United States* v. *Czarnecki*, 552 F.2d 698, 701-702 (6th Cir. 1977); *United States* v. *McFadyen-Snider*, 552 F.2d 1178, 1182-1183 (6th Cir. 1977); *United States* v. *Dudek*, 560 F.2d 1288, 1293-1297 (6th Cir. 1977).

Applying the "clear and convincing" evidence standard the rebuttal testimony of Caruthers falls short. All that Caruthers could testify was that there was a conversation between Bullington and himself relative to a possible transaction involving stolen trucks. There is no evidence that either Bullington or Caruthers did any act toward obtaining any trucks. It is clear from the proof that none were ever obtained. There is simply no crime, wrong or act as contemplated by Rule 404(b) which Bullington engaged in, much less any clear and convincing evidence of said crime, wrong or act such as to make the evidence relevant.

The Application of Rule 403

Even if all the requirements of Rule 404(b) are met, the admissibility of the evidence must still be subjected to the standards of Rule 403. If the danger of unfair prejudice substantially outweighs the probative value of the evidence even though relevant under Rule 404(b) it is subject to exclusion. Aside from the observations already made in the discussion of Rule 404(b), the danger of unfair prejudice not to mention actual prejudice is obvious from pertinent parts of the record:

> "BY THE COURT: But with the proper foundation the proof would have been relevant. It may have been improper to admit it because of its inflammatory nature, but it certainly is rel vant information bearing on the intent and knowledge of the defendant.
>
> Now, my problem is—and it is relevant, there's no question about that, and it's pertinent to the point.
>
> My problem is: Is it so inflammatory that I cannot, with a limiting instruction to the jury, wipe it out of their minds, and the only thing I can do is judge in my own mind. Despite how much effort I might

> make if I were on that jury to wipe it from my mind, with all of the other peculiarities in this lawsuit—and I think that's a fair summary of the things that I have heard here. Wouldn't you say 'peculiarities' would be a fair summary of it, Mr. Schwartz?
>
> BY MR. SCHWARTZ: Yes, sir.
>
> BY THE COURT: With all of the other peculiarities in this record it would be almost impossible for anybody to wipe that out of their mind, so I'm going to declare a mistrial.
>
> I take Mr. Farmer at his word that he didn't expect that kind of an answer, but he got it. I take it, Mr. Farmer, the answer you expected was, 'To pick up some trucks,' is what you . . . .
>
> BY MR. FARMER: That's correct, Your Honor.
>
> BY THE COURT: And if he had said that, that would have been perfectly—would have been a perfectly good answer, but I just don't believe there's any way I can wipe that out of this jury's mind.
>
> BY MR. FARMER: Can I respond, Your Honor—
>
> BY THE COURT: Certainly.
>
> BY MR. FARMER: —before you make the final ruling?
>
> If it please the Court, I don't know—first of all, I think Mr. Schwartz himself didn't even hear what he said.
>
> BY THE COURT: Oh, that jury heard it though. I heard it. I shook—I vibrated up here when I heard it.
>
> BY MR. SCHWARTZ: I had to say something to make it appear innocuous; I heard it.

BY THE COURT: Mr. Farmer, it's just one of these unfortunate circumstances. I know you well enough to know that you knew better and wouldn't have done it, and I take you at your word that even though you did get a little smart and say, 'Thank you,' when I ruled against you up here—I don't know whether you were intending to be smart or not, but ....

BY MR. FARMER: No, I wasn't, Your Honor, I certainly wasn't.

BY THE COURT: I guess the record ought to show I am laughing about that.

But I just don't believe that there's any way in the world with the peculiarities in this record that that jury is not going to consider that.

BY THE COURT: And the question is whether it's so inflammatory that it outweighs the relevance. He's not being tried for any crime, and we're talking about subsequent events to the alleged purchase, although during the course of time when he's charged with concealing."

CONCLUSION

The petitioner submits that the issues raised herein are significant and that the petition for writ of certiorari should be granted.

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ROBERT H. SCHWARTZ
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing petition to the Honorable Hal Hardin, United States Attorney, 879 United States Courthouse, Nashville, Tennessee 37203, this 26th day of May, 1978.

ROBERT H. SCHWARTZ

APPENDIX

APPENDIX A

No. 77-5337

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY T. BULLINGTON,
Defendant-Appellant.

ORDER

(Filed May 1, 1978)

Before: EDWARDS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

Appellant Henry Bullington was convicted by a jury of violations of 18 U.S.C. §§ 2312 and 2313. The sole issue presented on appeal is whether the district court erred in refusing to grant appellant's motion for a mistrial following the introduction of certain testimony concerning unrelated criminal acts by appellant. The case was submitted to the Court on the briefs and oral arguments of counsel and the Court has studied the record and is fully advised in the premises.

The Court is of the opinion that the district court did not abuse its discretion in refusing to declare a mistrial and that the issue raised by appellant is without merit.

It is ordered that the judgment of the district court be, and it hereby is, affirmed.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

APPENDIX B

United States District Court for

United States of America vs.

DEFENDANT: HENRY BULLINGTON

DISTRICT: MIDDLE DISTRICT OF TENNESSEE

DOCKET NO.: 77-20001-NE-CR

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH MAY DAY 17, YEAR 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Robert Schwartz (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a [redacted] verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY

Defendant has been convicted as charged of the offense(s) of

violating 18:2312 and 2313

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

three (3) years and fined the sum of $5,000.00 on Count 1. On Count 2 the defendant is sentenced for a period of one (1) year and fined the sum of $5,000.00. The sentance of Count 2 to run consecutively to sentence of Count 1.

RECEIVED FOR ENTRY
8:30 A.M.
May 18, 1977
FRANK E. WILLIAMS, Clerk
By: Betty McMahon
Deputy Clerk

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 5-18-77

Betty McMahon
CLERK
DEPUTY

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

L. Clure Morton

DATE May 18, 1977